Tenaga Gagah Sdn Bhd v Saik Siw Lai & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02(NCC)(A)-1544–09 OF 2014 AND W-03(IM)(NCC)-1–01 OF 2015

ROHANA YUSUF, HAMID SULTAN AND NALLINI PATHMANATHAN JJCA

8 APRIL 2016

Companies and Corporations — Winding up — Petition — Two separate winding up petitions filed against appellant — Court for first petition adjourned hearing after date fixed for second petition — Court for second petition granted winding up order against appellant and appointed liquidators — Court for first petition ordered second winding up order and appointed another liquidator to take precedence over liquidators appointed under second petition — Whether second winding up order may be granted where company had been validly wound up

The appellant was presented with two winding up petitions and one of the petitions was filed earlier than the other. At the first hearing of the first petition, the court was not appraised of the existence of the second petition. The court made an 'unless order' stipulating that unless the aggregate amount of RM699,013.40 was paid by the next hearing, the company would be wound up. The hearing was then adjourned to a date after the hearing date fixed for the second petition. At the hearing of the second petition, the solicitors for the appellant did not disclose to the court about the 'unless order' that had been made in respect of the first petition. Subsequently, the company was duly wound up on the basis of the second petition and the liquidators nominated under the second petition were appointed. At the adjourned hearing date of the first petition, the court concluded that the conduct of the appellant's solicitors amounted to a tactical manoeuver calculated to mislead the court. The learned judge went on to order that the company be wound up for a second time and liquidator nominated under the first petition to 'take precedence' over the liquidators appointed under second petition. Hence, this appeal. The single most important issue for determination was whether a second winding up order may be granted where a company had been validly wound up on an earlier occasion.

Held, allowing the appeal, setting aside the second winding up order and substituting the liquidators appointed under the first winding up order with the official receiver:

(1) It is settled legal principle that there is no prohibition against the filing of more than one winding up petition against a company at any one time. However, once a winding up order has been pronounced in respect of any one of these petitions, a second winding up order cannot be pronounced. In the instant case, the learned judge erred in granting the second order of winding up. The proper course to have been adopted would have been an order of dismissal against the petition which was filed earlier in time but heard subsequent to the second petition (see paras 33–35).

(2) The learned judge erred in ascertaining the date of commencement of winding up under s 219(2) of the Companies Act 1965 ('the Act') as relating back to the date of filing of the earlier of the two petitions. Section 219(2) provides that winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up. Section 219(2) does not provide that when there is more than one petition, that one which is earliest in time prevails. Nor does it provide that the date of commencement of winding up in a situation where there are two petitions is ascertained from the earlier dates of filing of the two petitions. In the instant case, the correct date for commencement would necessarily date back only to the date of presentation or filing of the second petition (see paras 36, 38 & 40).

[Bahasa Malaysia summary

Perayu diserahkan dengan dua petisyen penggulungan dan salah satu daripada petisyen difailkan terdahulu daripada yang satu lagi. Pada pendengaran petisyen pertama, mahkamah tidak menilai kewujudan petisyen kedua. Mahkamah membuat 'unless order' dengan menyatakan bahawa kecuali jumlah agregat sebanyak RM699,013.40 dibayar pada pendengaran seterusnya, syarikat akan digulung. Pendengaran kemudiannya ditangguhkan kepada tarikh selepas tarikh pendengaran ditetapkan untuk petisyen kedua. Pada pendengaran petisyen kedua, peguamcara bagi perayu tidak mendedahkan kepada mahkamah mengenai 'unless order' yang dibuat berkaitan petisyen pertama. Syarikat kemudiannya digulung dengan wajar atas asas petisyen kedua dan likuidator-likuidator yang dicalonkan di bawah petisyen kedua dilantik. Pada tarikh pendengaran penangguhan petisyen pertama, mahkamah memutuskan bahawa tingkah laku peguamcara perayu merupakan tindakan taktikal dianggap menipu mahkamah. Hakim yang bijaksana terus memberi perintah bahawa syarikat digulung bagi kali kedua dan likuidator yang dicalonkan di bawah petisyen pertama untuk 'take precedence' ke atas likuidator-likuidator yang dilantik di bawah petisyen kedua. Maka rayuan ini. Satu-satunya isu penting bagi penentuan adalah sama ada perintah penggulungan kedua mungkin diberikan di mana syarikat telah secara sah digulung atas kejadian sebelumnya.

Diputuskan, membenarkan rayuan, mengetepikan perintah penggulungan

kedua dan menggantikan likuidator-likuidator yang dilantik di bawah perintah penggulungan pertama dengan penerima rasmi:

(1) Adalah prinsip undang-undang tetap bahwa tidak terdapat larangan terhadap pemfailan lebih daripada satu petisyen penggulungan terhadap syarikat pada bila-bila masa. Walau bagaimanapun. Apabila saja perintah penggulungan telah diumumkan berkaitan salah satu daripada petisyen-petisyen ini, perintah penggulungan kedua tidak boleh diumumkan. Dalam kes ini, hakim yang bijaksana tersilap dalam memberikan perindah kedua penggulungan. Jalan betul yang patut digunakan adalah perintah penolakan terhadap petisyen yang telah difailkan dalam masa sebelumnya tetapi didengar selepas petisyen kedua (lihat perenggan 33–35).

(2) Hakim yang bijaksana tersilap dalam memastikan tarikh permulaan penggulungan di bawah s 219(2) Akta Syarikat 1965 ('Akta') seperti berkaitan semula kepada tarikh pemfailan kedua-dua petisyen sebelumnya. Seksyen 219(2) memperuntukkan bahawa penggulungan akan dianggap bermula pada masa penyerahan petisyen bagi penggulungan. Seksyen 219(2) tidak memperuntukkan bahawa apabila terdapat lebih daripada satu petisyen, yang terlebih dahulu akan mengatasi. Juga ia tidak memperuntukkan bahawa tarikh permulaan penggulungan dalam sesuatu keadaan di mana terdapat dua petisyen dipastikan daripada tarikh terawal pemfailan kedua-dua petisyen tersebut. Dalam kes ini, tarikh betul bagi permulaan semestinya tarikh kebelakangan hanya kepada tarikh penyerahan atau pemfailan petisyen kedua perlu (lihat perenggan 36, 38 & 40).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1709–1878.

Cases referred to

Building Societies' Trust, Limited, In re (1890) 44 Ch D 140, Ch D (refd)
European Banking Company ex parte Baylis, In re (1866) LR 2 Eq 521 (refd)
Ladli Parshad And Anor v Karnal Distillery Co Ltd AIR 1954 P H 94; 1954 24 CompCas 77 P H, HC (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248, CA (refd)
Norton Iron Co, In re (1877) 47 LJ Ch 9, Ch D (refd)
Savant-Asia Sdn Bhd v Sunway PMI-Pile Contruction Sdn Bhd [2009] 5 MLJ 754; [2008] 2 MLRA 31, FC (refd)
Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd [2011] 5 MLJ 416, CA (refd)

Legislation referred to

Companies Act 1965 ss 218(2)(a), 219(2)

Appeal from: Winding Up Petition Nos 28NCC-352–04 2014 and 28NCC-410–05 of 2014 (High Court, Kuala Lumpur)

Chin Tzi Song (Emmy Hazwani Jamil with him) (Ariffin & Partners) in Appeal No W-02(NCC)(A)-1544–09 of 2014 for the appellant.

Tan Keng Teck (Keneth VK Liew with him) (Lim Kian Leong & Co) in Appeal No W-03(IM)(NCC)-1–01 of 2015 for the appellant.

Ong Keh Keong (Ong Partnership) in Appeal No W-02(NCC)(A)-1544–09 of 2014 for the respondents.

M Muthuraman Muthu (YK Sui) in Appeal No W-03(IM)(NCC)-1–01 of 2015 for the respondents.

Phang Soon Mun in Appeal No W-02(NCC)(A)-1544–09 of 2014 for the liquidator.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] The single issue that arose for consideration in this appeal was whether a company can be wound up twice.

[2] There were two petitions for winding up presented against the respondent ('the company') by two separate petitioners. One was filed earlier than the other. The hearing date of the first petition was fixed prior to the second petition. The hearing date of the second petition, which was after the first petition, was not highlighted to the court or the first petitioner. In both the first and the second petitions, the respective petitioners sought the appointment of different liquidators.

[3] On the first hearing date of the first petition, at the behest of the solicitor for the company, the first petition was adjourned to a date after the hearing date fixed for the second petition. The court made an 'unless order' in respect of the first petition, stipulating that unless the aggregate amount of RM699,013.40 was paid by the next hearing date, the company would be wound up. At this first hearing the court was not appraised of the existence of a second petition in respect of the company.

[4] When the second petition came up for hearing, which was on a date prior to the adjourned date for the first petition, the solicitors for the respondent did not disclose or bring to the attention of the court the 'unless order' that had been made in respect of the first petition.

[5] The company was duly wound up on the basis of the second petition and the liquidators nominated under the second petition were appointed.

[6] Needless to say, the company did not comply with the unless order and when the adjourned first petition came up for hearing, solicitors for the company informed the court that the company had been wound up earlier, pursuant to the second petition.

[7] The court, after deliberating on the chronological order of events, ie the dates of filing of the two petitions as well as the chronology of events ensuing, coupled with the non-disclosure by the respondent's solicitors, concluded that the conduct of the respondent's solicitors amounted to a tactical manouvre calculated to mislead the court. Therefore the learned judge went on to order that the company be wound up for a second time. The court also went on to appoint the liquidator nominated under the first petition to 'take precedence' over the liquidators appointed under the second petition.

[8] The company appealed against the grant of the second order of winding up as well as the appointment of the liquidator under the first petition to take the place of the liquidators appointed earlier in time pursuant to the second petition.

[9] The chronology of events, is of primary importance and is set out below. We have adopted this chronology from the comprehensive judgment of the learned judge.

BACKGROUND FACTS

[10] On 24 April 2014 Winding Up Petition No 28NCC-352–04 of 2014 was filed and fixed for hearing on 10 July 2014 ('the first petition'). The first petition was premised on a failure to make good an award of the Tribunal for Homebuyuer Claims amounting to late interest charges in the sum of RM68,028.91 when a demand was duly made of the company under s 218(2)(a) of the Companies Act 1965 ('the Act'). Under this first petition, the petitioner sought to appoint one Wong Weng Foo as the liquidator.

[11] On 23 May 2014 Winding Up Petition No 28 NCC-410–05 of 2014 was filed and fixed for hearing on 31 July 2014 ('the second petition'). This second petition was premised on a claim for unpaid architectural fees amounting to RM12,734.41.

[12] On 20 June 2014, the second petitioner sought to intervene in the first petition to appoint Ler Cheng Chye and Lum Tuck Cheong as liquidators ('Ler & Lum'). The date of this application was fixed on the same date as the hearing of the first petition.

[13] It is apparent from the foregoing that different liquidators were sought by different creditors under the two petitions.

[14] On the first date of hearing of the first petition, solicitors for the second petitioner appeared and sought an adjournment on the grounds that the exchange of affidavits for the application to intervene had not concluded. Solicitors for the respondent who were present at the hearing of the first petition also presented a cheque in the sum of RM68,028.81 in settlement of the first petitioner's claim under the petition. The hearing of the first petition was then adjourned to 23 July 2014.

[15] However on the following day, namely 11 July 2014, the first petitioner's solicitors received a letter putting them on notice that several buyers had obtained awards from the Tribunal for Homebuyuer Claims and there could be no payment made to the first petitioner in preference over other creditors, as this would amount to undue preference.

[16] On the same date, solicitors for the second petitioner attended case management for the second petition where the registrar's certificate was issued and the second petition was fixed for hearing on 31 July 2014. The second petitioner did not highlight the hearing date of the second petition to the first petitioner or the court.

[17] After this the first petitioner received notices of intention to appear on the adjourned hearing date of the first petition from other sets of unsecured creditors on 21 and 22 July 2014. The first petitioner also filed an affidavit affirming to the fact that it would not utilize the cheque in the sum of RM68,028.81 as that would amount to an undue preference. The said monies were therefore placed with a stakeholder.

[18] On 23 July 2014, the adjourned date of the hearing of the first petition, the first petitioner's solicitors and solicitors for the other sets of unsecured creditors, numbering 52, claimed an aggregate amount of RM699,013.04. They appeared in court and supported the first petition. However the solicitor for the company, one Marcus Tan sought a postponement of the hearing of the first petition, claiming that the company was solvent and able to pay the aggregate sum owing to the 52 creditors.

[19] The learned judge, after anxious consideration, granted an unless order,

stipulating that unless the aggregate sum of RM699,013.04 claimed by the unsecured creditors was paid in full on or before the next hearing date, the company would be wound up. This second adjourned hearing date was fixed for the 8 August 2014.

[20] In the interim, on 31 July 2014, the second petition came up for hearing. The solicitor for the company was present but failed to highlight or disclose the fact that an 'unless order' had been made against the company, and that the adjourned hearing date of the first petition had been fixed on 8 August 2014. Instead the petition was duly heard and an order to wind up the company made on that day. Ler & Lum were appointed as liquidators, as sought under the second petition.

[21] When the first petition came up for hearing on the adjourned date, it transpired that the company had not complied with the 'unless order' of 23 July 2014. Instead the solicitor for the company advised the court that the company had been wound up one week later, on 31 July 2014.

[22] The learned High Court judge after deliberating on the chronological order of events as set out above granted a second order to wind up the company and further ordered that Wong Weng Foo 'take precedence' over Ler & Lim as liquidator.

THE DECISION OF THE HIGH COURT

[23] The reason proffered by the learned judge of the High Court for the grant of the second winding up order and the consequent substitution of the liquidator under the first petition, Wong Weng Foo in precedence over Ler & Lum was because Her Ladyship found that the solicitors for the company and the second petitioner had tactically delayed the hearing of the first petition to 8 August 2014, thereby ensuring that the second petition was heard on 31 July 2014. This enabled their chosen appointees, Ler & Lum, to take on the role of liquidator of the company. Of particular concern to her was the fact that while the solicitor for the respondent had expressly sought an adjournment to settle all creditors' claims on 23 July 2014, culminating in the grant of an 'unless order', no attempt had been made by the said solicitor to disclose or highlight to the court one week later on the hearing of the second petition that such an order had been made and that an adjourned date had been fixed for the hearing of the first petition. Neither did he see fit to highlight this fact to the court on 31 July 2014 when the winding up order under the second petition was pronounced. The identity of the second petitioner was not highlighted either.

[24] Equally the second petitioner did not highlight or disclose the existence of the first petition notwithstanding that the second petitioner had sought to intervene in the first petition.

[25] The learned judge found the lack of candour on the part of the solicitor for the company and the second petitioner deplorable and sought to unravel the seeming inequity of the situation by granting the second order of winding up.

[26] In so doing Her Ladyship relied on s 219(2) of the Act as judicially interpreted in the Federal Court case of *Savant-Asia Sdn Bhd v Sunway PMI-Pile Contruction Sdn Bhd* [2009] 5 MLJ 754 at p 764; [2008] 2 MLRA 31 at p 320, para 19 where His Lordship Ariffin Zakaria FCJ (now Chief Justice of Malaysia) stated as follows:

> [19] The single issue before is whether a petitioner in a winding up petition may be excused from advertising the fact of the petition after the debt had been fully paid by the respondent. If the answer to this question is in the negative then the appellant would succeed in its defence of absolute privilege.

And at para 21:

> [21] It is pertinent to note that the petition herin was grounded on the presumed insolvency under s 218(1)(e) read together with s 218(2)(a) of the Act. And under s 219(2) it is provided that the winding up shall be deemed to have commenced at the time of the presentation of the winding up. This provision has many important consequences one of which is that once the winding up petition has been duly presented it sets in motion the relevant provisions of the Act and WUR vis a vis the respondent. Hence the validity of the respondent's argument that since the appellant's debt had been fully settled by the date the advertisement was published in the newspaper, the appellant is therefore no longer obliged to advertise does not hold water. In this case the winding up petition was presented on 22 March 1999, and by virtue of s 219(2) of the Act the winding up of the respondent is deemed to have commenced on that date. Therefore as from that date the full rigour of the relevant provisions of the Act and WUR would apply to the respondent.

[27] Applying this principle in the present case, the learned judge determined that the winding up order under the first petition filed on 24 April 2014 and in respect of which a 'second' winding up order was pronounced on 8 August 2014, must take precedence over the second petition filed on 23 May 2014 and in respect of which a winding up order was made on 31 July 2014. In other words, the learned judge relied on s 219(2) of the Act to conclude that as there were two petitions for winding up, the one that was earlier in time would prevail over the second petition in a situation where the second petition was heard earlier in time.

[28] The single most important issue that arises for consideration is whether a second winding up order may be granted where a company has been validly wound up on an earlier occasion.

[29] Following from that the learned judge's conclusion that the second winding up order can prevail over the first winding up order by application of s 219(2) falls for consideration.

THE DECISION OF THE COURT OF APPEAL

[30] At the hearing of this appeal, having heard learned counsels and considered the chronology of events, we concluded that the second winding up order granted in respect of the first petition be set aside. This is because a company cannot be wound up twice. No order to wind up the company ought to have been pronounced on 8 August 2014. After setting aside the 'second' winding up order, there remained on record only the first order of 31 July 2014 winding up the company. From that date the order winding up the company took effect, if rendered the second order nugatory and superfluous.

[31] It needs to be stated that the conduct of the solicitor for the company and the second petitioner on 8 August 2014 was misleading when they failed to disclose or draw the court's attention to the existence of the first petition as well as the 'unless order' that had been made under the first petition. The fact that the second petitioner had intervened in the first petition evidences this. Such lack of disclosure amounts to misleading and is an unacceptable conduct on the part of an advocate and solicitor of the High Court of Malaya.

[32] We went on to make a further order at the hearing of the appeal. We ordered that the official receiver be appointed as the provisional liquidator of the company with effect from the date of the winding up order, ie 31 July 2014, in place of Ler & Lum. This in turn was to counter the effect of the lack of disclosure on the part of the solicitor for the company and the solicitors for the second petitioner, which had resulted in their preferred nominees, namely Ler & Lum being appointed as liquidators, rather than Wong Weng Foo. An application for the appointment of a liquidator in place of the provisional liquidator, the official receiver can then be considered in due course. Each party was ordered to bear its own costs and the deposit refunded.

REASONS FOR OUR DECISION

[33] It is a settled legal principle that there is no prohibition against the filing of more than winding up petition against a company at any one time. There is no requirement that leave of the court be obtained for the filing of the second or subsequent petition to wind up a company (see the decision of this court in

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 CLJ 248. See also *In re European Banking Company ex parte Baylis* (1866) LR 2 Eq 521 and *Ladli Parshad And Anor v Karnal Distillery Co Ltd* AIR 1954 P H 94; 1954 24 CompCas 77 P H).

[34] However once a winding up order has been pronounced in respect of any one of these petitions, a second winding order cannot be pronounced. In other words a company that has been wound up, cannot be subsequently wound up again (see the decision of this court in *Sinarlim Sdn Bhd v Waja Destinasi (M) Sdn Bhd* [2011] 5 MLJ 416).

[35] The learned judge erred in granting the second order of winding up. The proper course to have been adopted would have been an order of dismissal against the petition which was filed earlier in time but heard subsequent to the second petition i.e. after a winding up order had been granted in respect of the second petition (see *In re Norton Iron Co* (1877) 47 LJ Ch 9 and *In re Building Societies' Trust, Limited* (1890) 44 Ch D 140).

[36] The learned judge, with respect, further erred in the application of s 219(2) of the Act to the factual matrix of this case. As set out in that section and as explained in *Savant-Asia Sdn Bhd* (above) the section provides that a winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

[37] The use of the word 'the' preceding 'winding up' in the last segment of the section, clearly envisages that the date of commencement of a winding up and its consequences, come into play as of the date of the filing of that particular winding up petition.

[38] Section 219(2) does *not* provide that when there is more than one petition, that one which is earliest in time prevails. Nor does it provide that the date of commencement of winding up in a situation where there are two petitions is ascertained from the earlier dates of filing of the two petitions. Neither does the section sanction the pronouncement of two orders of winding up successively, followed by a calculation or ascertainment of the date of commencement as dating back to the filing of the first petition filed, notwithstanding that the first order of winding up was pronounced in respect of the petition filed second in time. The correct date for commencement would necessarily date back only to the date of presentation or filing of the second petition.

[39] In other words the petition that is heard first in time and results in the grant of an order of winding up is the correct date to ascertain the commencement of winding up as stipulated under s 219(2).

[40] The learned judge therefore erred in granting two orders winding up the same company twice, and then ascertaining the date of commencement of winding up under s 219(2) as relating back to the date of filing of the earlier of the two petitions.

[41] For these reasons we reversed the decision of the learned judge and allowed the appeal, setting aside the second order seeking to wind up the company twice. As stated above we further substituted the liquidators appointed under the first order for winding up with the official receiver. This allowed the parties to apply for the liquidators of their choice by way of further application to the winding up court where they could both be heard, and a fully considered decision be made by the court with the benefit of disclosure of all the salient facts.

Appeal allowed, second winding up order set aside and liquidators appointed under first winding up order substituted with official receiver.

Reported by Dzulqarnain Ab Fatar